

# EXHIBIT 5

**In the Matter Of:**

NEW ENGLAND COMPOUNDING PHARMACY, INC. PRODUCTS LIABILITY

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**VIDEOTAPED DEPOSITION OF KENNETH R. LISTER, M.D.**

*March 09, 2015*

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NEW ENGLAND COMPOUNDING PHARMACY, INC. PRODUCTS LIABILITY  
VIDEOTAPED DEPOSITION OF KENNETH R. LISTER, M.D. on 03/09/2015

Pages 158..161

<p style="text-align: right;">Page 158</p> <p>1 A. I have no idea.</p> <p>2 Q. Did you ever use this script when you</p> <p>3 talked with any of the patients you talked with?</p> <p>4 A. When I talked to patients I talked with, I</p> <p>5 talked about medical problems, not financial problems.</p> <p>6 Q. Okay. Did any of the patients whom you</p> <p>7 spoke with ask you whether Specialty Surgery Center</p> <p>8 would pay any of their medical bills?</p> <p>9 A. No.</p> <p>10 Q. You can put that to the side. We're</p> <p>11 finished with it. I'm going to hand you what we're</p> <p>12 going to mark as Exhibit 90 to your deposition,</p> <p>13 SSC-02316. Have you ever seen that document before,</p> <p>14 sir?</p> <p>15 (Exhibit 90 was marked for</p> <p>16 identification.)</p> <p>17 MS. HOLLABAUGH: Mark, can you</p> <p>18 identify that for us, please.</p> <p>19 MR. CHALOS: Sure. Did you hear the</p> <p>20 Bates number?</p> <p>21 MS. HOLLABAUGH: I did.</p> <p>22 MR. CHALOS: You did not?</p> <p>23 MS. HOLLABAUGH: I did, but I don't</p> <p>24 have a copy of the document.</p> <p>25 MR. CHALOS: Okay. Hang on one</p>	<p style="text-align: right;">Page 160</p> <p>1 A. No, I do not.</p> <p>2 Q. Did anyone ever tell you that NECC gave</p> <p>3 that to you at Specialty Surgery Center?</p> <p>4 A. No.</p> <p>5 Q. Do you believe that their statements are</p> <p>6 true?</p> <p>7 A. I believe that I have to take this into</p> <p>8 considerable consideration when I administer a</p> <p>9 medication. Whether it's true or not, I can't</p> <p>10 specifically say.</p> <p>11 Q. Okay. Well, you still give your patients</p> <p>12 Depo-Medrol; right?</p> <p>13 A. Yes, I do.</p> <p>14 Q. So you've concluded that whatever risks</p> <p>15 there are associated with it, they're outweigh the</p> <p>16 benefits to your patients; right?</p> <p>17 A. My patients have concluded that.</p> <p>18 Q. And you don't disagree?</p> <p>19 A. I don't disagree.</p> <p>20 Q. You wouldn't do something for your patient</p> <p>21 that -- where the risks outweigh the benefits, would</p> <p>22 you?</p> <p>23 A. No, I would not.</p> <p>24 Q. Even if the patient asked for it?</p> <p>25 A. No, I would not.</p>
<p style="text-align: right;">Page 159</p> <p>1 second.</p> <p>2 MR. GIDEON: It's the "End depo now"</p> <p>3 document.</p> <p>4 MS. HOLLABAUGH: Okay.</p> <p>5 MR. GIDEON: You're welcome to come</p> <p>6 down here and look at it if you want to.</p> <p>7 MR. CHALOS: We have extra copies.</p> <p>8 We're just digging them out.</p> <p>9 THE WITNESS: I have seen this</p> <p>10 document before.</p> <p>11 Q. (By Mr. Chalos) You have?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. In what context have you seen it?</p> <p>14 A. I believe that I saw it actually several</p> <p>15 years ago, and with the -- associated with the "End</p> <p>16 Depo Now" campaign, which was online.</p> <p>17 Q. What was that campaign about?</p> <p>18 A. It was an attempt to place forward</p> <p>19 information, correct or not, that Depo-Medrol caused</p> <p>20 severe arachnoiditis in many patients.</p> <p>21 Q. Okay. Do you know who was behind that</p> <p>22 campaign?</p> <p>23 A. No.</p> <p>24 Q. Do you know where Specialty Surgery Center</p> <p>25 got that document?</p>	<p style="text-align: right;">Page 161</p> <p>1 (Exhibit 91 was marked for</p> <p>2 identification.)</p> <p>3 Q. (By Mr. Chalos) I'm going to hand you what</p> <p>4 we'll mark as Exhibit 91. It's SSC-00953 through</p> <p>5 SSC-00960, and it says "SSC pharmaceutical services</p> <p>6 policies." I'm going to ask you in particular about</p> <p>7 the second page, which is the approved medications</p> <p>8 section.</p> <p>9 And I'm going to ask you, Doctor, just</p> <p>10 about Page 00954.</p> <p>11 A. Okay.</p> <p>12 Q. You can --</p> <p>13 A. Then I've reviewed that.</p> <p>14 Q. Okay. Yeah, I mean, you can look at the</p> <p>15 whole document. I'm just going to ask you about to</p> <p>16 that one page for now. Do you recognize what this</p> <p>17 page is here? This is Exhibit 91, Page SSC-00954?</p> <p>18 A. This appears to be an SSC approved</p> <p>19 medication list.</p> <p>20 Q. Was this the medication list that was in</p> <p>21 effect in 2012, to your knowledge?</p> <p>22 A. I don't see a date on it.</p> <p>23 Q. Do you know -- separate from whether</p> <p>24 there's a date on the top of the document, do you know</p> <p>25 whether this was --</p>

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1 A. No, I do not.

2 Q. How would we find that out?

3 MR. GIDEON: Let him finish; okay?

4 Q. (By Mr. Chalos) You've been doing great

5 all day long.

6 MR. GIDEON: You really have.

7 Sometimes you think he's finished and he's

8 not. Just let him finish.

9 THE WITNESS: Okay.

10 Q. (By Mr. Chalos) I was finished that time.

11 I'll do it again. How would we find out whether this

12 was the list of approved medications for Specialty

13 Surgery Center in 2012?

14 A. I don't know.

15 Q. Is that something Ms. Atkinson might know?

16 A. She may.

17 Q. Does Calisher & Associates have any role

18 with respect to the management of Cumberland Medical

19 Center?

20 A. Not as far as I know.

21 Q. Were the Calisher & Associates group -- was

22 the Calisher & Associates group managing Specialty

23 Surgery Center right up until the time Specialty

24 Surgery Center ceased operation?

25 A. Yes, I believe they were.

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1 Q. How did you learn about this outbreak?

2 A. Jean Atkinson called me when the initial

3 recall was obtained by her, and at that point in time,

4 we canceled all my cases.

5 Q. What did you learn during that first phone

6 call?

7 A. Only that there was potential particular

8 contamination to the NECC product.

9 Q. When did you first learn that any of your

10 patients had been made sick by the NECC product that

11 you injected into them?

12 A. I don't believe that I learned anything

13 about a sick patient until Monday or Tuesday of the

14 next week.

15 Q. Okay. On what day of the week did you

16 learn about the contaminated medication?

17 A. We learned of the -- what do you mean by

18 contaminated medication?

19 Q. On what day did you receive that first call

20 from Ms. Atkinson that there had been a recall of the

21 NECC product?

22 A. On Thursday.

23 Q. Okay. And then Monday of the next week is

24 when you believe you learned that at least one of your

25 patients had been made sick by those injections?

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1 A. Correct.

2 Q. Did you do anything between Thursday and

3 Monday with respect to the NECC situation?

4 A. All of the patients that had received the

5 NECC product were called on Friday.

6 Q. Who called them?

7 A. The center personnel.

8 Q. Specialty Surgery Center personnel?

9 A. Specialty Surgery Center personnel.

10 Q. Okay. They called at that point all 164

11 patients?

12 A. Correct.

13 Q. What did they tell them?

14 A. They told them a specific release from the

15 Department of Health.

16 Q. Okay. So they were given a script to

17 follow in those --

18 A. They were given a script to follow.

19 Q. Did you talk to any of your patients over

20 that first weekend?

21 A. Not over the first weekend, no.

22 Q. Okay. And what happened then after you

23 learned that there had been a patient that was made

24 ill?

25 A. Well, actually before I learned a patient

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1 had been made ill, I learned on Sunday that there was

2 a potential patient ill here in Nashville, that it was

3 potential fungal contamination, and on Monday we began

4 to call everyone with another script regarding the

5 potential of meningitis.

6 Q. And that was another script from the

7 Tennessee Department of Health?

8 A. Correct.

9 Q. And when did you first start yourself

10 calling patients?

11 A. Monday morning, 7:00 a.m.

12 Q. And approximately how many of the 164

13 patients that -- of your patients that were injected

14 with NECC's MPA, how many did you speak with?

15 A. At least half.

16 (Exhibit 92 was marked for

17 identification.)

18 Q. (By Mr. Chalos) I'm going to hand you what

19 we've marked as Exhibit 92. It's SSC-00306 through

20 SSC-00312. If you could please take a look through

21 this document and tell us what we're looking at here.

22 A. This is a handwritten call record where I

23 attempted to contact as many patients as I possibly

24 could with regard to this catastrophe.

25 Q. And these are your handwritten notes?

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<p style="text-align: right;">Page 166</p> <p>1 A. Correct.</p> <p>2 Q. Are there any other notes that you took</p> <p>3 regarding your communications with patients other than</p> <p>4 what's included here in Exhibit 92?</p> <p>5 A. I don't believe there's any other notes</p> <p>6 that I took.</p> <p>7 Q. Are there any other notes that you took</p> <p>8 either handwritten or electronically regarding NECC or</p> <p>9 the contaminated medication from NECC other than what</p> <p>10 we see here in Exhibit 92?</p> <p>11 A. I don't believe so.</p> <p>12 Q. When you searched your e-mails on your</p> <p>13 Comcast.net account, did you find any e-mails that</p> <p>14 were related to NECC's medication or the meningitis</p> <p>15 outbreak?</p> <p>16 A. I didn't search my e-mails.</p> <p>17 Q. Right. When the lawyers searched your</p> <p>18 e-mails, do you know whether they found any e-mails in</p> <p>19 your e-mail account related to NECC or the medications</p> <p>20 or the outbreak?</p> <p>21 A. There may have been some communication from</p> <p>22 Dr. Kainer or one of the other doctors in the</p> <p>23 Department of Health.</p> <p>24 Q. Were there any communications between you</p> <p>25 and Specialty Surgery Center in that batch that they</p>	<p style="text-align: right;">Page 168</p> <p>1 M.D. We're back on the record and the time</p> <p>2 is 2:58 p.m.</p> <p>3 Q. (By Mr. Chalos) Doctor, if you could pull</p> <p>4 out Exhibit 91. It's the SSC pharmaceutical services</p> <p>5 policies. This -- I'm referring you in particular to</p> <p>6 Page SSC-00954. Do you see that?</p> <p>7 A. Yes, I do.</p> <p>8 Q. And is Depo-Medrol without preservative</p> <p>9 listed on the Specialty Surgery Center formulary?</p> <p>10 A. Depo-Medrol is listed on the formulary.</p> <p>11 Q. Does that include Depo-Medrol with</p> <p>12 preservative and Depo-Medrol without preservative?</p> <p>13 A. Yes, it would.</p> <p>14 Q. And why do you say that?</p> <p>15 A. Because it doesn't say specifically one way</p> <p>16 or the other.</p> <p>17 Q. So in your view, if it doesn't say</p> <p>18 specifically one way or the other, it includes all</p> <p>19 formulations including those without preservatives?</p> <p>20 A. Correct.</p> <p>21 Q. In 2012, did Specialty Surgery Center have</p> <p>22 a quality improvement committee?</p> <p>23 A. Yes, it did.</p> <p>24 Q. Who was on that?</p> <p>25 A. I believe all of the members of the medical</p>
<p style="text-align: right;">Page 167</p> <p>1 found?</p> <p>2 A. I don't remember any.</p> <p>3 Q. Who from the Calisher &amp; Associates group</p> <p>4 was ever onsite at Specialty Surgery Center?</p> <p>5 A. Ever?</p> <p>6 Q. Yes, sir.</p> <p>7 A. Okay. Mr. Calisher and his wife Gina.</p> <p>8 Q. Janet?</p> <p>9 A. Gina.</p> <p>10 Q. Gina. Anybody else?</p> <p>11 A. That's all.</p> <p>12 Q. Were either Mr. Calisher or Gina Calisher</p> <p>13 licensed medical professionals?</p> <p>14 A. I believe both are nurses.</p> <p>15 Q. RNs?</p> <p>16 A. I believe so.</p> <p>17 MR. CHALOS: All right. Why don't we</p> <p>18 take a break now, and we may be getting</p> <p>19 near the end of my questioning.</p> <p>20 VIDEOGRAPHER: We're off the record.</p> <p>21 This is the end of Tape No. 4. The time is</p> <p>22 2:38 p.m.</p> <p>23 (A recess was taken.)</p> <p>24 VIDEOGRAPHER: Here begins Tape No. 5</p> <p>25 in the deposition of Kenneth R. Lister,</p>	<p style="text-align: right;">Page 169</p> <p>1 board -- of the executive board were on the quality</p> <p>2 improvement committee.</p> <p>3 Q. And did the quality improvement committee</p> <p>4 at Specialty Surgery Center review the NECC-related</p> <p>5 outbreak?</p> <p>6 A. Yes, it did.</p> <p>7 Q. When was that?</p> <p>8 A. I don't remember.</p> <p>9 Q. Were you -- did you participate in that</p> <p>10 process?</p> <p>11 A. Yes, I would have.</p> <p>12 Q. Do you recall participating in the process?</p> <p>13 A. No.</p> <p>14 Q. Did you attend any meetings of the quality</p> <p>15 improvement committee related to the fungal meningitis</p> <p>16 outbreak?</p> <p>17 A. I don't recall any meetings specifically</p> <p>18 related to the fungal meningitis outbreak.</p> <p>19 Q. Did it come up at other meetings?</p> <p>20 A. It may have.</p> <p>21 Q. And you're talking about the board</p> <p>22 meetings?</p> <p>23 A. Correct.</p> <p>24 Q. And I think -- you think it came up in the</p> <p>25 October 2012 board meeting?</p>

<p style="text-align: right;">Page 194</p> <p>1 approved.</p> <p>2 Q. So you believed it then and you believe it</p> <p>3 now; correct?</p> <p>4 A. Correct.</p> <p>5 Q. What's the basis for that belief?</p> <p>6 A. Because the -- because all compounded</p> <p>7 medications are under the direct supervision of the</p> <p>8 FDA.</p> <p>9 Q. And I believe you testified in response to</p> <p>10 previous questioning that you hadn't seen any of the</p> <p>11 literature prior to 2012 about the risks of compounded</p> <p>12 drugs; correct?</p> <p>13 A. I had not seen any specific literature</p> <p>14 related to the risk of compounded medications.</p> <p>15 Q. Do you remember hearing about --</p> <p>16 A. No.</p> <p>17 Q. -- risks of compounded drugs?</p> <p>18 A. No.</p> <p>19 Q. What was your understanding prior to July</p> <p>20 of 2012 as to what compounding pharmacies did?</p> <p>21 A. Compounding pharmacies produced medications</p> <p>22 that are not generally available in the marketplace,</p> <p>23 specialty medications that are needed, but</p> <p>24 manufacturers do not make.</p> <p>25 Q. Did you understand prior to 2012 that a</p>	<p style="text-align: right;">Page 196</p> <p>1 on the list of approved medications?</p> <p>2 A. "On an annual basis, the executive</p> <p>3 committee shall review the list of approved</p> <p>4 medications for the center to use."</p> <p>5 Q. Right. You just read what's under the</p> <p>6 heading procedure.</p> <p>7 A. Correct.</p> <p>8 Q. How does a new medication -- is there a</p> <p>9 process for getting a new medication onto the</p> <p>10 formulary?</p> <p>11 A. I presume that the new medication would</p> <p>12 have to be approved on an annual basis by the</p> <p>13 executive committee.</p> <p>14 Q. But you don't have a -- have you ever been</p> <p>15 through that process? In other words, have you ever</p> <p>16 sought executive committee approval for any</p> <p>17 medication?</p> <p>18 A. No. The typical pathway for getting a new</p> <p>19 medication would be to ask Jean, who goes through the</p> <p>20 Calishers, and then who approaches the executive</p> <p>21 committee.</p> <p>22 Q. Have you been through that process before?</p> <p>23 A. No.</p> <p>24 Q. Did you ever discuss with Ms. Atkinson</p> <p>25 whether or not you should seek executive committee</p>
<p style="text-align: right;">Page 195</p> <p>1 compounding pharmacy actually uses raw ingredients to</p> <p>2 actually mix the compounding drug?</p> <p>3 A. I'm not a pharmacist. I don't know how</p> <p>4 they produce these medications.</p> <p>5 Q. Do you think they ordered them from</p> <p>6 somebody?</p> <p>7 A. Like I said, I'm not a pharmacist. I don't</p> <p>8 know how they produce the medications.</p> <p>9 Q. Do you still have Exhibit 91 in front of</p> <p>10 you, Dr. Lister? Do you mind turning back to that.</p> <p>11 A. Correct.</p> <p>12 Q. This is the SSC-00954, the list of approved</p> <p>13 medications.</p> <p>14 A. Correct.</p> <p>15 Q. And this is, in essence, the SEC formulary?</p> <p>16 A. That's what it appears to be, yes.</p> <p>17 Q. And then the name formulary isn't on it,</p> <p>18 but it -- in essence, this was the formulary at SSC?</p> <p>19 A. In essence, it was.</p> <p>20 Q. What's the purpose of the -- of the</p> <p>21 approved medications policy?</p> <p>22 A. The purpose is stated right here. To</p> <p>23 provide safe effective medications for the center's</p> <p>24 patients.</p> <p>25 Q. What's the process for getting a medication</p>	<p style="text-align: right;">Page 197</p> <p>1 approval to get preservative-free MPA on the</p> <p>2 formulary?</p> <p>3 A. I don't believe that's a new medication.</p> <p>4 Q. Did you ever have any conversations with</p> <p>5 Ms. Atkinson about that?</p> <p>6 A. I don't believe that's a new medication, so</p> <p>7 no.</p> <p>8 Q. In your view, preservative-free MPA was</p> <p>9 essentially the same thing as Depo-Medrol?</p> <p>10 A. Correct.</p> <p>11 Q. Even though it had different ingredients</p> <p>12 and didn't have any preservatives in it?</p> <p>13 A. It didn't have different ingredients. It</p> <p>14 just didn't have a preservative in it.</p> <p>15 Q. So it was different in that sense anyway?</p> <p>16 A. It was different only in the sense that it</p> <p>17 did not have the picolinium, but the active</p> <p>18 ingredients were the same.</p> <p>19 Q. Now, you said a moment ago that you're not</p> <p>20 a pharmacist; correct?</p> <p>21 A. Correct.</p> <p>22 Q. And does Ms. Atkinson have any pharmacy</p> <p>23 expertise?</p> <p>24 A. No, she doesn't.</p> <p>25 Q. And who at Calisher has pharmacy expertise?</p>



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<p style="text-align: right;">Page 198</p> <p>1 A. I'm not sure.</p> <p>2 Q. But neither of you sought to consult with</p> <p>3 anyone that you knew to be a pharmacy expert</p> <p>4 purchasing medications from NECC, did you?</p> <p>5 A. No.</p> <p>6 Q. Does SSC have a pharmacist available for</p> <p>7 oversight or consultation even if it's not an</p> <p>8 employee?</p> <p>9 A. There's a pharmacist that occasionally</p> <p>10 gives recommendations, but that's all I know.</p> <p>11 Q. He doesn't have any kind of a</p> <p>12 contractual --</p> <p>13 A. No.</p> <p>14 Q. -- relationship with SSC?</p> <p>15 A. No.</p> <p>16 Q. Dr. Lister, would you mind just turning</p> <p>17 back to Exhibits 93 and 94 for a moment. Now, this is</p> <p>18 a document that's title is "Prescription order form";</p> <p>19 correct? Both 93 and 94 have that title.</p> <p>20 A. Correct.</p> <p>21 Q. And do you recall seeing that title when</p> <p>22 you signed these order forms?</p> <p>23 A. I recall it being an order form. That's</p> <p>24 all I recall.</p> <p>25 Q. I mean, NECC wasn't making any drugs</p>	<p style="text-align: right;">Page 200</p> <p>1 pharmacy board regulations?</p> <p>2 A. No, I did not.</p> <p>3 Q. Do you know if Ms. Atkinson talked to Gina</p> <p>4 Calisher about those?</p> <p>5 A. Yes, I did.</p> <p>6 Q. And what did she tell you about that</p> <p>7 conversation that she had with Gina Calisher?</p> <p>8 A. She told me that the Tennessee pharmacy</p> <p>9 board regulations did not preclude us buying from</p> <p>10 NECC.</p> <p>11 Q. As long as you gave them the patient names?</p> <p>12 A. The patient names I understood were a</p> <p>13 requirement of Massachusetts, not Tennessee.</p> <p>14 Q. Are you aware that the NECC sales</p> <p>15 representative actually sent Ms. Atkinson a copy of</p> <p>16 some regulations?</p> <p>17 A. I'm not specifically aware of that.</p> <p>18 Q. But you are aware that she -- that</p> <p>19 Ms. Atkinson discussed with the NECC representative</p> <p>20 some kind of a regulatory requirement?</p> <p>21 A. Correct.</p> <p>22 Q. If you'd take a look back at Exhibit 93,</p> <p>23 Dr. Lister, the last page is Bates stamped 27,</p> <p>24 SSC-00027. You see that?</p> <p>25 A. Correct.</p>
<p style="text-align: right;">Page 199</p> <p>1 pursuant to prescriptions, were they?</p> <p>2 A. I'm not sure of your question.</p> <p>3 Q. I mean, did NECC have any patient</p> <p>4 prescriptions or did they make any patient</p> <p>5 prescriptions?</p> <p>6 A. Again, I'm not sure of your question.</p> <p>7 Q. Well, were you and SSC ordering</p> <p>8 prescriptions from NECC?</p> <p>9 A. We were told that because NECC was licensed</p> <p>10 as a pharmacy that they needed prescription names for</p> <p>11 this order.</p> <p>12 Q. They didn't need actual prescriptions.</p> <p>13 They just needed names; correct?</p> <p>14 A. Correct.</p> <p>15 Q. Was that a red flag at all to you?</p> <p>16 A. No, it was not.</p> <p>17 Q. Why not?</p> <p>18 A. I've been in medicine 38 years. A lot of</p> <p>19 things have changed in 38 years. In 38 years we've</p> <p>20 seen many, many, many changes and I thought this was</p> <p>21 just another change in medicine.</p> <p>22 Q. Are you aware of any other instance where</p> <p>23 SSC had to give patient names to order medications?</p> <p>24 A. I'm not aware of any.</p> <p>25 Q. Did you personally review the Tennessee</p>	<p style="text-align: right;">Page 201</p> <p>1 Q. And this is an order for 100 vials of</p> <p>2 preservative-free MPA?</p> <p>3 A. Correct.</p> <p>4 Q. Do you recall whether 100 vials was a</p> <p>5 larger order than usual for SSC?</p> <p>6 A. I don't recall.</p> <p>7 Q. One way or the other, whether it was large</p> <p>8 or small or average?</p> <p>9 A. Average.</p> <p>10 Q. How often does the executive committee</p> <p>11 meet?</p> <p>12 A. I believe the executive committee meets</p> <p>13 once a quarter -- met once a quarter.</p> <p>14 Q. Was that the same -- was that combined with</p> <p>15 the board meeting or was it a separate meeting?</p> <p>16 A. It was separate meetings, but continuous.</p> <p>17 Q. I'm sorry, I may have missed this before.</p> <p>18 But was it -- were the same people on the executive</p> <p>19 committee as were on the board?</p> <p>20 A. Yes.</p> <p>21 (Exhibit 97 was marked for</p> <p>22 identification.)</p> <p>23 Q. (By Mr. Chalos) I'm showing you</p> <p>24 Exhibit 97, Dr. Lister. Do you know what Exhibit 97</p> <p>25 is, Dr. Lister?</p>